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Legal and Moral Pluralism: A Rejoinder (in European Human Rights Law)

Alain Zysset¹

Abstract

Sociological and normative, the concept of legal pluralism presupposes a 'legal system' or a 'law-like' normative order displaying a distinctive structure (eg an institutionalised system of rules and sanctions) whose boundaries can be determined and distinguished from others (or from non-law). Legal pluralism thereby presupposes that the boundaries between those entities are *cognisable* (descriptively or normatively) and distinguish large-scale entities ('system', 'order', 'layer', etc).

In this article, I argue that this overlapping concept of legal pluralism is inapplicable to human rights law either *descriptively* or *normatively* (with particular emphasis on the ECHR). Normatively, the recent philosophical literature suggests that human rights (law) may be endorsed by a variety of moralities (eg collectivistic) that make it safe from the critique of *parochialism*, legal or moral. Descriptively, European human rights law has never been legally depicted as autonomous and complete legal order in the vein of EU law in *Van Gend en Loos*. This is explained by the structural principle of *subsidiarity* shaping the complementing roles of the ECtHR reviewing state records and national courts applying the ECHR.

How shall we then understand the point (if any) of legal pluralism in the context of European human rights law? I argue that one first needs to uncover the link between *legal* and *moral* pluralism and therefore 'pierce' the large-scale boundaries premised in the conventional concept of legal pluralism. I show how pluralism is used in the reasoning of the ECtHR's to justify its authority on national courts, so that the distinction between legal 'orders' or 'systems' is contingent upon the normative role that *moral* pluralism plays in justifying the duties correlative to human rights.

Keywords:

Legal pluralism; European human rights law; legal theory; political theory

1. Introduction

The concept of legal pluralism has played two major roles in the recent history of legal thought. On the one hand, anthropologists created the concept to examine the law-like character of tribal, religious and other customary norms. This first concept of legal

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pluralism was premised on the distinction between state and non-state normative systems and therefore concentrates on 'that state of affairs, for any social field, in which behavior pursuant to more than one legal orders occurs'.² On the other hand, the concept has been extensively used in the field of EU law to describe the 'clash of final authority'³ between the EU legal order and the national legal order. In this case, the concept captures the conflicting co-existence of two allegedly autonomous and complete legal systems or orders characterised by a court with general and compulsory jurisdiction. Here pluralism refers to a plurality of the same kind, the legal 'system' or legal 'order' generated by the modern state and its freedom to conclude international treaties and delegate interpretive authority to international courts (conferred to the CJEU by the Treaties in the case of the EU).

While those two classical concepts of legal pluralism certainly and importantly differ, they also share some important assumptions. Most importantly, they both presuppose a 'legal system' or a 'law-like' normative order displaying a distinctive structure (eg an institutionalised system of rules and sanctions) whose boundaries can be determined and distinguished from others (or from non-law). Both concepts of legal pluralism determine those boundaries differently. Socio-legal scholars may have abandoned the search for a social-scientific concept of law in framing legal pluralism, but they still maintain that normative 'orders' or 'systems' exist and that those entities governing social relations can be distinguished *a posteriori*, that is, by observing and reconstructing normative practices and contrasting them with the state ones. This can take a variety of forms and methods (more empirical or more interpretive, *Verstehen*-like). But sociological pluralism must, if it is to differ from *monism*, imply a point of separation and/or friction between two distinct and complex ontological entities ('state-law' vis-à-vis 'non-state law' or 'non-state law' vis-à-vis 'non law').

In the case of EU law (hereafter, European legal pluralism), in contrast, the boundaries are not *a posteriori* obtained. Rather, in this case legal pluralism depends on an *a priori* and *normative* concept of public law that differently determines the boundaries of the EU legal order vis-à-vis the national legal order (or vis-à-vis the international legal order as in the *Kadi* case). In other words, to contest the limits of the CJEU's jurisdiction is to discuss the very nature of the EU. Again, one should not underestimate the divergences between the sociological and European kinds of legal pluralism (the very possibility of an independent, positivist account of law may be at stake). But there is also a common fundamental assumption, namely the existence and persistence of boundaries between those self-contained entities (descriptively or normatively). Not only do legal pluralists claim that those boundaries exist, but they also hold that they are *identifiable* (descriptively or normatively). If such boundaries cannot be found, legal pluralism simply disappears as a meaningful analytical concept.

² John Griffiths, 'What Is Legal Pluralism?' (1986) 24 Journal of Legal Pluralism 1, 3.

³ Neil Walker, 'Legal Theory and the European Union' (2005) 25(4) Oxford Journal of Legal Studies 581, 592.

In this article, I argue that this overlapping concept of legal pluralism is inapplicable to human rights law — either *descriptively* or *normatively*. On the one hand, the recent literature in normative human rights theory suggests that human rights (law) may be endorsed by a variety of moralities (eg collectivistic) that protect it from the critique of *parochialism*, legal or moral. As I shall explain, this does not prevent one from giving human rights a thin but substantive moral basis. Consequently, the assumption of boundaries between ‘systems’ or ‘orders’ founded on incommensurable moral foundations is questionable. On the other hand, European human rights law has never been identified as an autonomous and complete legal order in the vein of EU law in *Van Gend en Loos*.⁴ This is explained by the principle of *subsidiarity* and the various roles it plays and theory and practice (jurisdictional, interpretive, remedial). As a result, as in the context of the European Convention on Human Rights (hereafter, the ECHR), there is no necessary connection between the national and supranational levels of human rights law-making. Therefore, legal pluralism in European human rights law does not involve a claim to legal completeness as in EU law. If the identity of the EU legal system is still contentious⁵, the one of the ECHR is even harder to contemplate. The boundaries are likely to change despite that the European Court of Human Rights (hereafter, ECtHR) also holds ultimate interpretive authority. Both descriptively and normatively, legal pluralism thrives on boundary setting. The development of human rights law and human rights theory challenges this core assumption. Is there any feature of conventional legal pluralism, nevertheless, that could serve the study of human rights law? If the sociological pluralism applied to human rights (law) is difficult to defend, the tension between national and supranational levels of law making (as in EU law) remains salient in European human rights law too. The debate about the margin of appreciation is a case in point.⁶ If the boundaries between the two levels are not analogous to EU law, how should we construe them? This is where, I argue, one needs to examine the link between *legal* and *moral* pluralism and therefore ‘pierce’ the large-scale boundaries premised in the conventional concept of legal pluralism. The first step of my argument is to uncover the role of moral pluralism in human rights theory. Normative human rights theorists radically disagree over the foundations of those rights. However a vast majority of views converge in incorporating pluralism into the very structure of the concept of human rights. Regrettably, however, normative human rights theorists have not yet examined, *if*, *how*, and to *what extent* the pluralism of human rights law coheres with the moral pluralism of human rights theory. This article is also an attempt to fill this gap.

The second step of the argument is to take a *descriptive* standpoint to show that such moral pluralism plays a similar justificatory role in one of the most developed human

⁴ CJEU, Case 26/62 *Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1, para 9.

⁵ On this issue, see in particular Julie Dickson, ‘Towards a Theory of European Union Legal Systems’, in Julie Dickson and Pavlos Eleftheriadis (eds), *Philosophical Foundations of European Union Law* (Oxford University Press 2012) 25-53.

⁶ In the recent literature, see in particular the contributions in Eva Brems and Janneke Gerards (eds), *Shaping Rights in the ECHR: The Role of the European Court of Human Rights in Determining the Scope of Human Rights* (Cambridge University Press 2014). See also George Letsas, ‘Two Concepts of the Margin of Appreciation’ 26(4) *Oxford Journal of Legal Studies* 705.

rights practices — the one of the ECtHR. Upon closer inspection, it appears that the ECtHR justifies its interpretive authority over national courts by relying on ‘pluralism’ — to ground, limit and balance rights in the ECtHR’s review process. I shall here primarily refer to the ECtHR’s case law on freedom of expression (Article 10) where the normative role of pluralism is most salient. I show that the ECtHR relies on pluralism as the normative standard to measure the margin of appreciation left to the respondent state party. The more one’s view contributes to a pluralistic and contradictory public debate in the public sphere, the more the ECtHR restricts the margin of appreciation. Of course, the concept of pluralism is here specifically *moral*. But if the ECtHR relies on this pluralism to justify its authority on national courts, then the boundaries of legal orders (the allocation of jurisdiction) turn into a *consequence* of moral pluralism. Given this central justificatory role, the connection between legal and moral pluralism is more than *coincidental*. To this extent, my argument echoes Muniz-Fraticelli’s recent research on the structure of pluralism across domains of practical reason.⁷

As a result, I suggest re-ordering the *legal-empirical* and the *normative* levels of analysis: one has to address the fundamental and justificatory role of moral pluralism *within* the concept of human rights (law) in order to determine the boundaries *between* ‘orders’, ‘systems’ or ‘layers’ implied in the conventional accounts of legal pluralism. The literature in normative human rights theory, on the one hand, and the more legal-empirical literature on legal pluralism, on the other, have been expanding independently for quite some time and regrettably so. As far as sociological legal pluralism is concerned, the nascent literature on the compatibility between legal pluralism and human rights law assumes that each form a distinct ontological order whose frontier can neatly be drawn.⁸ As far as European legal pluralism is concerned, those who articulate the point of legal pluralism in normative terms do not specify how the pluralism of ‘orders’ — by distinguishing the allocation of judicial authority — specifically relates to the role of pluralism *within* one or the other order.⁹ I argue that the latter enjoys precedence over the former.

Finally, once one has a better understanding of the derivative role of legal pluralism from moral pluralism, one can better make sense of the multifaceted role of subsidiarity in European human rights law. Whether ‘jurisdictional’, ‘interpretive’, or ‘remedial’, subsidiarity allows states to interpret and implement human rights according to their

⁷ As Muniz-Fraticelli invites us to think, ‘meta-ethical pluralists, political pluralists, and legal pluralists have each made claims about normative elements in their respective domains from independent premises, and having little or no documented contacts with each other’s work. The name pluralism here appears to be a coincidence, and an attempt to make something of this coincidence commits a nominalist fallacy’. In Victor M Muniz-Fraticelli, *The Structure of Pluralism* (Oxford University Press 2014) 12.

⁸ Helen Quane, ‘Legal Pluralism and International Human Rights Law: Inherently Incompatible, Mutually Reinforcing or Something in Between?’ (2013) 33(4) Oxford Journal of Legal Studies 675. I examine Quane’s account in more detail later on in the article.

⁹ Matthias Kumm, ‘The Moral Point of Constitutional Pluralism: Defining the Domain of Legitimate Institutional Civil Disobedience and Conscientious Objection,’ in Julie Dickson and Pavlos Eleftheriadis (eds), *Philosophical Foundations of European Union Law* (Oxford University Press 2012) 216-246. I examine Kumm’s account in more detail later on in the article.

particular pluralism. As we have seen, the ECtHR interferes when state parties fail to implement the conditions fostering pluralism in public life. On pain of endangering the egalitarian basis of human rights, pluralism however is not assigned a specific content. The connecting thread between pluralism in the democratic procedure and human rights is precisely the search for public or political equality. In fact, since the pluralism promoted by the ECtHR is *procedural*, I suggest viewing the role of this court as reinforcing the democratic process of law making at the domestic level. Therefore, the ECtHR does not exercise its authority in the name of novel and sovereign political community (as hypothesised in European legal pluralism). Rather, it reinforces and consolidates the democratic order in place — the domestic one — and subsidiarily exercises authority in the name of that political community.¹⁰ This can be best explained by the role that pluralism plays in the normative theory of democracy. The egalitarian argument for democracy¹¹, most prominently, suggests that pluralism is the reason why democracy is preferable to other forms of political authority based on political equality in the circumstances of deep pluralism. By exercising democratic rights before turning to vote (most clearly expression and association), democratic subjects can best express their pluralistic views and therefore consolidate their status of political equals. As a result, when the ECtHR for instance investigates whether right-holders (eg political parties, journalists or intellectuals) contribute to a pluralistic debate on issues of public interest, it consolidates the egalitarian conditions of the democratic process *internally*. This also means that the ‘plurality of pluralisms’ does not extend to the *negation* of pluralism.

2. Legal Pluralism and the Descriptive Boundaries

In this section, I distinguish two conventional concepts of legal pluralism that have developed in recent legal scholarship. Each concept was coined in a particular context of scholarship and involves particular premises about the nature of law, which in turn shape the meaning of pluralism. On the one hand, anthropologists created the concept to examine the relationship, compatibility and ordering between tribal, religious and other (non-state) customary norms on the one hand and state law on the other. This concept of legal pluralism is clearly connected to the sub-fields of legal anthropology and socio-legal studies, which took off in the 1970s.¹² Its pioneering critique targets the necessary connection between law and the modern state: the idea that ‘law is and should be the law of the state, uniform for all persons, exclusive of all other law, and administered by a single set of state institutions’¹³ forms the grounds of their critique. One may call this the rejection of *legal centralism*. On the other hand, the concept has gained prominence in

¹⁰ As Muniz-Fraticelli explains, ‘subsidiarity is not a principle through which to organize a polity, but rather a principle by which to govern a polity already organized (...)’, in Muniz-Fraticelli (n 7) 70.

¹¹ The egalitarian argument is owed to Thomas Christiano, *The Constitution of Equality: Democratic Authority and Its Limits* (Oxford University Press 2010). I examine Christiano’s account later on in the article.

¹² See Emmanuel Melissaris, *Ubiquitous Law: Legal Theory and the Space for Legal Pluralism* (Ashgate 2009) ch 2.

¹³ Griffiths (n 1) 3.

the field of EU law in order to capture the clash of authority between the EU legal order and the national/international legal order. In this case, the concept detects the conflicting co-existence of two allegedly autonomous and complete legal systems or orders characterised by a court with general and compulsory jurisdiction. The explosion of legal scholarship in most recent years is related to two famous cases of the Court of Justice of the European Union (hereafter, the CJEU), namely *Costa*¹⁴ and *Kadi*.¹⁵ In this context, the ultimate maker and subject of legal pluralism remains the state and the inter-state creation of the EU and/or the broader international legal order.

Let me first elaborate on the two concepts before elaborating on their overlapping structure. As stated earlier, the most frequent use of legal pluralism pertains to the question of the relationship, ordering and compatibility between tribal, religious and other customary norms, on the one hand, and the positive law (mostly Western and generated by the modern state), on the other. I am not here assuming that this definition captures the breadth of legal pluralism in the recent history of legal thought. The theoretical framework as well as the methodology employed to capture legal pluralism may vary widely. The spectrum between ‘empiricist-positivist’ theories and ‘dispersed legality’ suggested by Melissaris may help in mapping the territory.¹⁶ The central claim sociological pluralists share, nevertheless, is that law *is* not and *should* not be limited to the law of ‘official state legal institutions’.¹⁷ To detach legality from the state (law) seems to be the grounding project of legal pluralism. However, it is highly contentious whether that project can be pursued without assuming a prior concept of *law* or *law-likeness* — either on the state side and/or on the one from which state law is to be distinguished. If plural systems are *law-like*, what justifies (and to what extent) their distinction from the conventional state law? In other words, what justifies enlarging the scope of legal inquiry is precisely the pre-existence of a unifying concept of law. As Melissaris explains, pluralists seem to assume ‘some criteria which pre-exist and indeed, guide social inquiry into the legal phenomenon but then goes on unconvincingly to attempt to play down those criteria by arguing that they only reveal a very loose and vague prima facie content of “law” (...)’.¹⁸ Even founders of the concept of legal pluralism of this first sort have eventually abandoned the project of what they call ‘a social-scientific conception of law’¹⁹ in the face of this infinite regress problem. This mirrors Hart’s ultimate acknowledgment that a theory of law that proceeds by observation from an external standpoint is doomed to fail as it cannot grasp the internal, *reasons-giving* nature of law.²⁰

¹⁴ CJEU, Case C-6/64 *Flaminio Costa v ENEL* [1964] ECR 585.

¹⁵ CJEU, Case C-402/05 P *Yassin Abdullah Kadi v Council of the European Union and Commission of the European Communities* [2008] ECR I-0000.

¹⁶ For an overview of earlier accounts of legal pluralism, see Melissaris (n 11) ch 2.

¹⁷ Brian Tamanaha, ‘Understanding Legal Pluralism: Past to Present, Local to Global’ (2007) 29 *Sydney Law Review* 375.

¹⁸ Melissaris (n 12) 32.

¹⁹ Tamanaha (n 17) 396.

²⁰ On Hart’s sociological approach to law, see in particular Stephen Perry, ‘Hart’s Methodological

In response to this pervasive problem, Brian Tamanaha suggests in a more recent article that the study of sociological pluralism should be served by another concept, that of a 'system of normative ordering'.²¹ There are reasons to doubt that this conceptual twist survives the objection. First, the objection to the concept of 'law' in legal pluralism could also apply with the same force to the concept of 'system of normative ordering'. The very fact of providing a conceptual category for cataloguing normative phenomena already implies some minimal, unifying and therefore *monistic* content. Alternatively, if the contemplated pluralism applies all the way down to the first, non-derivative premises of what counts as law, then the very enterprise of legal inquiry is doomed to fail. As Melissaris puts it, 'it seems hardly possible to kick off the enquiry in the first place, as the social-legal theorist will be inescapably trapped within her own conceptual scheme'.²² Tamanaha goes so far as to hold that law is whatever people identify and treat through their social practices as 'law'. Here what is at stake is not only the conflation of legal and social theory. One can wonder if such an approach can provide *any* guiding principle and therefore it can construct *any* theory. In the words of Himma, 'we cannot use law to refer to anything if the norms governing its application did not specify certain features of an object that warrant calling it "law"'.²³

Second, it is not clear if, in Tamanaha's account, 'normative' ought to be distinguished from 'moral'. If one admits that one can conform to state law and non-state law for moral reasons, the alleged pluralism simply evaporates as far as the nature of their bindingness is concerned. On pain of giving a more thorough account of law-likeness (such as a hierarchy of rules or a system of sanctions), legal pluralism seems to meaningfully operate only to *guide* legal research, but not to hold claims about the nature of legal normativity. In turn, if the contemplated pluralism is about morality and distinct moral systems, as Tamanaha seems to imply²⁴, then one needs to explain why legal centralism is not a moral concept either, which would also re-introduce monism into the picture.²⁵ Here the conflation of legal and moral theory is at stake. In turn, if legal pluralism is not moral, 'law has no essence beyond the linguistic conventions and practices constituting it' and pluralism as an alternative to the predominant concept of law also evaporates.²⁶ The same objection applies to Twining's definition according to which legal pluralism implies 'an institutionalized and stable normative order governing important social relations in a law-like way coexisting with, but separate from, state

Positivism' (1998) 4(4) Legal Theory 427.

²¹ Tamanaha (n 17) 397.

²² Melissaris (n 12) 2.

²³ Kenneth Einar Himma, 'Do Philosophy and Sociology Mix? A Non-Essentialist Socio-Legal Positivist Analysis of the Concept of Law' (2004) 24(4) Oxford Journal of Legal Studies 717, 737.

²⁴ As Tamanaha puts it, 'their specific shapes and features will not be the same as those discerned by Hart for state law, but whatever distinctive features they do have will be amenable to observation through careful attention to the social practices that constitute them': Brian Tamanaha, *A General Jurisprudence of Law and Society* (Oxford University Press 2001) 159.

²⁵ As Postema explains in a seminal article, 'the internal point of view is the view committed to the practice, who endorses its rules and requirements, possibly on moral grounds', in Gerald Postema, 'Jurisprudence as Practical Philosophy' (1998) 4 Legal Theory 329, 332.

²⁶ Melissaris (n 12) 32.

law'.²⁷ The more general concept of 'normative pluralism' recently coined is concerned too.²⁸ Again, one may argue that the frontier between the two normative entities is porous, imperfect, or changing, but then one may wonder if legal pluralism as analytic concept has more to offer than just an overview of two ontological entities that *seem* distinct.

Note that this infinite regress problem also applies to the more recent literature on the compatibility between legal pluralism and European human rights law. Here again, the preservation of boundaries between the ECHR ('law') and legal pluralism ('law-like') are problematic. In a recent article, Quane explains that:

to summarize the European approach, it is not possible to find any support for the existence of an obligation under the Convention to introduce or maintain some form of legal pluralism (...). It would appear that depending on the nature and degree of legal pluralism, it may be permitted under the Convention.²⁹

To hold that legal pluralism may be permitted implies the 'law-like' phenomena *de facto* become 'law' by the recognition of the ECtHR. However, Quane assumes that legal pluralism is distinct from human rights law and proceeds without exactly defining how both acquire their self-contained and systemic character in the same problematic way as Tamanaha and Twining above. If legal pluralists cannot provide for a solid criterion to distinguish the boundaries of those 'plural' orders, then legal pluralism could extend to other claims made by right-holders before the ECtHR (eg an extremist political party). Whether the claim held by right-holders is supported by a distinct normative 'order' or 'system' seems necessary to clarify before positing a strict line of demarcation. If this is not provided, the distinction between legal and moral pluralism again evaporates.

Now, one could object that sociological pluralism is just one among other kinds of descriptive pluralism in legal theory. In particular, one could simply return to a radical form of sociological positivism championed by HLA Hart (against which sociological pluralism initially developed³⁰). From this standpoint, the boundary question is simply answered by appealing to Hart's driving notion of the 'rule of recognition' — the master secondary rule that determine which primary rules are valid.³¹ One could then suggest that legal pluralism refers to multiple rules of recognition and therefore offer an exclusively functional account of law and legal pluralism. While I cannot offer a full

²⁷ William Twining, 'Normative and Legal Pluralism: A Global Perspective' (2010) 20 *Duke Journal of Comparative & International Law* 473, 493.

²⁸ It seems that Twining endorses the view that the renouncement of legal pluralism and the adoption of normative pluralism simply leads us to the basic questions of moral and legal theory: 'If one treats legal pluralism as a species of normative pluralism, this helps to de-mystify legal pluralism by de-centering the state, providing links to a rich body of literature, and showing that some of the puzzlements surrounding pluralism can usefully be viewed as much broader issues of general normative and legal theory', see *ibid* 515.

²⁹ Quane (n 8) 689.

³⁰ See Tamanaha (n 17) 397.

³¹ See HLA Hart, *The Concept of Law* (Oxford University Press 1961) 89–96.

assessment of Hartian positivism here³², let me identify two major obstacles for this alternative framework to apply to the present context, one *theoretical* and the other *empirical*. First, legal positivism of a Hartian kind is built upon rejecting the necessary connection between law and morality. However, as explained above, it is not yet clear if sociological pluralism is a moral or a non-moral thesis. Answering this question seems necessary to identify what Hartian positivism is an alternative to. Tamanaha's functional claim that 'systems of primary and secondary rules that are not administered by legal officials may be institutionalized normative systems, but they are not legal'³³ does not ultimately help clarify this point.

Second, to argue that there are multiple rules of recognition in European human rights law neglects the difficulty of depicting European human rights law as 'legal system' in the Hartian sense and therefore constructing a Hartian form of pluralism. This is due to the combination of two facts. On the one hand, state parties to the ECHR have a legal obligation to abide (Article 46) by the ECtHR's judgments, which thereby establishes the hierarchy of legal officials that unifies the legal system in Hartian terms. In addition, a vast majority of state parties abide by it — either by incorporating the ECHR in their internal legal hierarchy (its rank vis-à-vis the sources of national law) or in attributing the ECtHR's judgments *direct effect*. This makes Hartian pluralism less informative in the present context. On the other hand, this unifying function applies only within the limits of the ECHR and does encompass the scope of state legal systems. Furthermore, state parties are bound only by the judgment they are a party to (*res judicata*) and may benefit of the margin of appreciation. Therefore, what Giudice and Culver call the 'presumption of hierarchy'³⁴ needs to be thoroughly adjusted to the jurisdictional specificities of European human rights law. Given the central role(s) of subsidiarity, it is widely agreed that the ECHR 'system' does not give rise to a novel legal system (in contrast to EU law), as I explain in the next section. This speaks against the very applicability of the Hartian framework to the present context.

3. Legal Pluralism and the Normative Boundaries

Let me now turn to the second prominent concept of legal pluralism, the one of European legal pluralism (EU law). In contrast to the first, this second concept is not premised on the separation between 'law' and 'law-like' systems as two ontologically distinct entities. Rather, the concept detects the conflicting co-existence of two allegedly autonomous and complete legal 'systems' or 'orders' characterised by a court with general and compulsory jurisdiction: the CJEU on the one hand and constitutional courts on the other. At first glance, what unites this field of legal scholarship is that 'law' or 'legal system' is constructed in similar terms *ontologically speaking*, namely state and

³² For a fully-fledged and recent critique of Hart's rule of recognition, see in particular Keith Culver and Michael Giudice, *Legality's Borders: An Essay in General Jurisprudence* (Oxford University Press 2010) ch 1. It must be noted that Culver and Giudice do not concentrate on European human rights law.

³³ Tamanaha (n 24) 142.

³⁴ See Culver and Giudice (n 32) chs 1-2.

inter-state law, and the apparent lack of hierarchy between them. This lack of hierarchy is posited against the background of the exclusive jurisdiction the CJEU. As Dickson puts it, ‘the Court of Justice claims sole authority to determine the force and effect of EU norms, the relation between EU norms and the norms of other bodies of law, and views these claims as justified because the EU possesses its own legal system’.³⁵ The CJEU’s claim that EU law enjoys primacy over the constitutional law of Member States in *Costa*, and in *Kadi* that no other body of law besides EU law itself can determine the validity of its own norms, remains seminal. The setting of boundaries also operates in the theoretical literature on EU law, in which the concept of ‘legal system’ is defended as (still) relevant to improve our understanding of EU law.³⁶

Legal pluralism so-construed also applies to European human rights law, albeit with various and non-negligible peculiarities. Applying the standard of law-applying institutions as unifying the system, Article 46 ECHR meets the standard by attributing ultimate interpretive authority to the ECtHR. However, the analogy is of very limited use given the far more important role that *subsidiarity* plays in the human rights context. This is also where the term ‘legal pluralism’ has been coined. In this context, legal pluralism pertains to the variety of ways in which the ECHR has been recognised and enforced in domestic legal orders — what Krisch terms the ‘open architecture of human rights law’.³⁷ There are, we should recall, crucial differences between the judicial powers of the CJEU and those of the ECtHR. In particular, the ECtHR is only a *subsidiary* and *declaratory* organ. While the CJEU benefits from Article 267 TFEU³⁸ that allows for a constant judicial dialogue with national courts³⁹, the ECtHR simply *declares* whether state laws conform to the ECHR and leaves it to the state to choose the appropriate measure(s) to respond to the judgment (*remedial* subsidiarity). This may partly explain why the CJEU could in principle hold that the EU legal order forms an autonomous legal order (integrated into the domestic ones). It may also explain why while both the CJEU’s and the ECtHR’s judgments benefit from *direct effect* (direct applicability and invocability), in the ECtHR’s case it is up to national courts to assign its judgments such effect.⁴⁰

³⁵ Dickson (n 5) 46.

³⁶ *ibid.*

³⁷ See in particular Nico Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (Oxford University Press 2012) 109–151.

³⁸ Article 267 TFEU fosters the cooperation between the CJEU national courts to ensure that EU law is applied uniformly across Member States.

³⁹ As Dickson explains, ‘the EU is endowed with its own sources of law, law-making institutions and procedures, method of policing Member States’ compliance with EU obligations, procedures for the judicial review of EU norms, and largely thanks to the judicial activism of the CJEU, its own distinctive take regarding the direct enforceability of EC law by individuals in Member States’ courts, and its primacy over national law in case of conflict’, in Julie Dickson, ‘How Many Legal Systems? Some Puzzles Regarding the Identity Conditions Of, and Relations Between, Legal Systems in the European Union’ (2008) 2 *Problema* 9, 17.

⁴⁰ See in particular André Nollkaemper, ‘The Duality of Direct Effect of International Law’ (2014) 25(1) *European Journal of International Law* 105.

Nevertheless, in both cases, legal pluralism refers in principle to a plurality of the same ontological kind, the legal 'system' or legal 'order' generated by the officially recognised state (according to its constitutional provisions), which in both cases implies the right to delegate judicial authority to a supranational court. The same is true of the lack of hierarchy between the EU legal order and the international legal order. As Besson explains in the case of *Kadi*, European legal pluralism in this case 'is about whether or not it is only a matter of EU law to determine the validity, rank and effects of international norms within the European legal order, and how it can legitimately do so'.⁴¹ Here again, I cannot retrace the history of European legal pluralism and detail the various positions that have structured the debate. What I want to emphasise is the distinctive ontology of law that underlies the concept of European legal pluralism. In contrast to the legal pluralism of the first kind, European legal pluralism does more than just distinguish contradicting claims to authority (the CJEU vs national constitutional courts) on a certain legal question. The literature has shown that the conflict is a *normative* one that concerns the kind of moral and political community that the EU *should* count for. In other words, the lack of hierarchy or proper relation of authority can be argued for in purely normative terms *a priori*, which makes the study of European legal pluralism fall under normative legal and political theory, in contrast to sociological or interpretive approaches.

Mattias Kumm has most clearly extracted the normative tension that underlies European legal pluralism in his contribution entitled 'The Moral Point of Legal Pluralism'.⁴² His distinction between 'democratic statism', on the one hand, and 'legal monism', on the other, are the two normative concepts of public law that can explain the *malaise* between *Costa* and *Kadi*. On the one hand, democratic statism implies that 'state law ultimately derives its authority from "we the people" imagined as having acted as a *pouvoir constituant* to establish a national constitution as a supreme legal framework for democratic self-government'.⁴³ As a result, the consent for a state to subject itself to an international judicial organ by enforcing its norms domestically implies ratification following constitutional and democratic requirements. This goes hand in hand with the premise that international law is 'inherently infected by a democratic deficit'.⁴⁴ When the CJEU claimed that that EU law enjoys primacy over the constitutional law of Member States in *Costa*, it did not rely on some form of democratic statism. Indeed, democratic statism would require that the EU be identified as a federal state 'based on an act by the citizenry acting as a *pouvoir constituant*'.⁴⁵ If that normative standard is not met, that is, if the EU remains an international organisation, the Member States depicted as constitutional democracies remain the ultimate authority of their own legal order. Of course, this normative framework eventually requires conducting a test (in empirical

⁴¹ Samantha Besson, 'European Legal Pluralism after Kadi' (2009) 5(2) European Constitutional Law Review 237, 241.

⁴² Kumm (n 9)

⁴³ Kumm (n 9) 221.

⁴⁴ *ibid.*

⁴⁵ *ibid* 224.

terms) to determine whether the EU qualifies as a federal state normatively construed. Should the amendment procedure of the treaties be unanimous? How far does the EU law authorise legislation in the core areas of sovereignty (taxes, foreign policy, criminal law, etc)? However, if the test is empirical, the normative standards cannot be. These are fully normative and moral. Note, however, that here democratic statism does not *a priori* reject international law as ‘national constitutions may well contain norms that specifically authorize the enforcement of EU law in most cases’.⁴⁶

On the other hand, ‘legal monism’ is the view that in case of conflict between EU law and national law, national courts should give primacy to the former. This is the view underlying the claim that the EU legal order forms a novel and *sui generis* legal order distinct from the national ones in *Van Gend en Loos*.⁴⁷ The view is also supported by the CJEU’s effort to distinguish EU treaties from other international treaties and by the limited power of the European parliament to enact valid legislation by qualified majority vote. Kumm rightly explains that monism reflects a Kelsenian view of the world legal order according to which there should be no conflict of rules *at all* between the national and the international legal orders. In fact, legal monism cannot tolerate the co-existence of two legal systems that would apply the same legal rule differently if it is to count *as law*. An important consequence of legal monism is that if EU law takes primacy over national law in *Costa*, UN law should also have primacy over EU law in *Kadi*. Similarly, Kumm argues, despite the notable specificities of EU law (*compulsory jurisdiction, direct effect*, etc), UN law is also sensibly different from ordinary treaty law. A full reconstruction of the debate and merits of democratic statism and legal monism, as well as their theoretical origins, is beyond the scope of this article. The crucial point I want to highlight is that in contrast to the first kind of legal pluralism, legal pluralism refers to the tension between two normative concepts of public law: the democratic one in *Costa* and the monist one in *Kadi*. European legal pluralism depicted *qua* disorder can emerge insofar as one applies either one or the other concept to the CJEU’s and to constitutional courts’ judgments.

Let me now synchronically sum up my overview of the two predominant concepts of legal pluralism. First, the sociological concept of legal pluralism is premised upon the distinction between ‘law’ and ‘law-like’. Although the pluralism is deemed profound (possibly *incommensurable* with state law), legal pluralists assume but fail to define the underlying concept of ‘law-likeness’. If the epistemology of legal pluralism is *empirical* — what counts as law is a matter of observer-neutral observation — then legal pluralism lends itself to the same critique that Hart finally acknowledged: the impossibility of grasping law’s normativity from an external standpoint.⁴⁸ However, if some normative premises remain, those imply a unifying and monistic content that

⁴⁶ *ibid.*

⁴⁷ CJEU (n 3).

⁴⁸ As Perry puts it, ‘the idea is to describe and elucidate our conceptual scheme from the outside, as it were. In that way the observer can remain neutral with respect to such questions as to whether the social practice is in fact justified’, in Perry (n 20) 440.

contradicts the thesis of deep pluralism about law. Second, I have suggested that European legal pluralism frames the boundaries of legal systems in normative terms. In this case, the allocation of judicial authority depends on the kind of *pouvoir constituant* that the EU *should* be. If the EU remains an international organisation, the Member States remain the ultimate authorities of their own legal order. While the two kinds of pluralism differ in their ontology, they share a similar assumption, namely a legal order's boundaries are identifiable (normatively or descriptively). The point of separation and/or friction is systemic and determines the order's jurisdiction.

4. The Peculiarities of Human Rights (Law)

In this section, I turn more specifically to European human rights law and show that the approach of systemic boundary setting (normative or descriptive) is inapplicable to this context. I proceed in three steps. First, I explain how the theory and the practice of human rights law (with special reference to the ECtHR) resist the boundaries distinctive of legal pluralism. Second, I argue that the systemic dimension of conventional legal pluralism obscures the connection between legal pluralism (about orders) and moral pluralism (about rights). My central claim is that the distinction between 'orders' and 'systems' in human rights law depends on how we understand pluralism *within* the concept of human rights (law). In order to support this claim, it is necessary to build a bridge between normative human rights theory, on the one hand, and human rights practice (in particular the ECtHR). Third, I show how this account can better explain the complementary roles of supra- and national courts as articulated by the multi-faceted principle of subsidiarity.

4.1. Rebutting Sociological Pluralism

Let me first explain why the concept of human rights resists the boundaries on which sociological pluralism implicitly relies. While human rights must capture an inherent status or interest of human beings to meet the demand of universality, such normative basis is not necessarily derived from a comprehensive moral view. One may refer to various prominent contributions to human rights theory to support this point. In *On Human Rights*, James Griffin argues that human rights protect our status of normative agents. As Griffin explains, 'anyone who has the capacity to identify the good, whatever the extent of the capacity and whatever its sources, has what I mean by "a conception of a worthwhile life"; they have ideas, some of them reliable, about what makes a life better or worse'.⁴⁹ The personhood account points to the necessary conditions for each one's moral view to flourish. Moral pluralism can be seen as the natural consequence of this capacity being widely exercised across cultures. The capacity-based approach thereby prevents the formation of irremediably distinct 'orders' or 'systems' as premised in sociological pluralism; those are limited to the negation of 'personhood'.

⁴⁹ James Griffin, *On Human Rights* (Oxford University Press 2008) 46.

Some human rights theorists find Griffin's account excessively *teleological* and opt for a more *procedural* approach. Rainer Forst, for instance, defends the 'right to justification' as deontological threshold for human rights. Rather than protecting the conditions necessary to form and realise a conception of a worthwhile life, the right to justification points to a demand of status recognition in a political community:

the moral basis for human rights, as I reconstruct it, is the respect for the human person as an autonomous agent who possesses a right to justification, that is, a right, to be recognized as an agent who can demand acceptable reasons for any action that claims to be morally justified and for any social or political structure or law that claims to be binding upon him or her.⁵⁰

Human rights refer to those basic rights that cannot be denied to human beings understood as agents of justification. Consequently, the output of the procedure — the list of rights and duties — is not pre-determined and may accommodate a wide pluralism: 'as the universal core of every internal morality, the right to justification leaves this to the members' specific cultural or social context'.⁵¹ Forst's procedural approach reinforces the point that one can understand human rights in pluralist terms while not abandoning the search for a thin but substantive moral basis.

One could object that the boundaries apply specifically to the *individualistic* dimension of human rights law. As Allen Buchanan explains in his recent book, 'because the system of international legal human rights accords a prominent role to individual legal rights, it must rest on individualistic moral foundations — normative assumptions that are inconsistent with some important tenets of valid collectivistic moralities'.⁵² This claim is unconvincing, Buchanan argues, because the exercise of human rights can support those moralities by securing a space in which they can develop their own (collective) endeavors. Major human rights documents 'explicitly characterize humans as social beings and acknowledge the importance of the rights they declare in enabling individuals to flourish as social beings'⁵³; 'in fact, the hard-won struggle for legal rights to freedom of religion emerged in the context of mutually destructive conflicts among religious groups'.⁵⁴ Further, Buchanan suggests that a normative theory of human rights *law* should be grounded in a variety of interests (in particular, those of states). This is because legal rights, in contrast to moral rights, must be grounded in a variety of interests and not solely those of the right-holder (not solely 'subject-grounded'⁵⁵). In

⁵⁰ Rainer Forst, 'The Justification of Human Rights and the Basic Right to Justification: A Reflexive Approach' (2010) 120(4) *Ethics* 711, 719.

⁵¹ Rainer Forst, 'The Basic Right to Justification: Towards a Constructivist Conception of Human Rights' (1999) 6(1) *Constellations* 35, 42.

⁵² Allen Buchanan, *The Heart of Human Rights* (Oxford University Press 2013) 250.

⁵³ *ibid* 260.

⁵⁴ *ibid*.

⁵⁵ *ibid* 59.

analogy to Griffin and Forst, Buchanan's normative account relies on a thin but substantive moral basis, namely 'affirming and protecting equal basic status for all'.⁵⁶

One could also reply that Griffin, Forst or Buchanan employ a *normative* concept of human rights that makes the sociological concept of pluralism safe. Yet practice-oriented theorists also emphasise the fact that those rights (the actions they justify in the social world) generate a wide diversity of actions and practices across the social and political world. In his seminal book, Charles Beitz lists the various 'paradigms of implementation'⁵⁷ that have come to constitute the core of the political practice of global human rights, such as accountability, inducement, assistance, domestic contestation and engagement, compulsion and external adaptation.⁵⁸ From this empirical basis Beitz infers that the very concept of human rights is inherently pluralistic. The interest protected by human rights 'has a kind of importance that it would be reasonable to recognize across a wide range of possible lives'.⁵⁹ This partially explains why those rights cannot derive from 'a single, more basic value or interests such as those of human dignity, personhood, or membership. The reasons we have to care about them vary with the content of the right in question (...). Human rights protect a plurality of interests and require different kinds and degrees of commitment of different agents'.⁶⁰

This leads to the claim that human rights cannot be easily confined to a particular moral 'order' or 'system' (or only *prima facie*) with large-scale identifiable boundaries. Regrettably, however, normative human rights theorists have not yet examined, *if, how*, and to *what extent* the pluralism of human rights law coheres with the moral pluralism in human rights theory. I try to bridge this gap in the following sections.

4.2. Rebutting European Legal Pluralism

If pluralism is internal to the concept of human rights, those rights are also recognisable through a set of norms and practices distinctive of international law (their nature as treaty law, their status in domestic law, etc). This is where I turn to the concept of pluralism in descriptive terms. As already indicated, the analogy between the EU context and the European human rights context is very limited. In contrast to EU law, European human rights law has never been legally depicted as an autonomous and complete legal order in the vein of the former in *Van Gend en Loos*. This is explained by the powerful structural principle of *subsidiarity* revealing the complementing roles of the ECtHR reviewing state records and national courts applying human rights law. At the *jurisdictional* level, the applicant must have exhausted domestic remedies before being considered at the supranational level. At the *remedial level*, the judgments are generally *declaratory* and leave it to the respondent state to choose the appropriate measure to

⁵⁶ *ibid* chs 1–2.

⁵⁷ Charles Beitz, *The Idea of Human Rights* (Oxford University Press, 2009) 33.

⁵⁸ *ibid* 33–44.

⁵⁹ *Ibid* 111.

⁶⁰ *ibid* 128. It must be noted that Beitz' account has been criticised for failing to account for the egalitarian dimension of human rights, see in particular Buchanan (n 52).

respond to the judgment. At the *interpretive* level, human rights courts such as the ECtHR may accord a wide margin of appreciation to state parties depending on the issue at stake. Moreover, the legal obligation of state parties in principle implies only the *decisional* content of the judgment (*inter partes* effect).⁶¹ In fact, there is no necessary connection between the two levels of human rights law-making. National courts can interpret and enforce human rights without the aid of a supranational institution.⁶²

As a result, the term 'legal pluralism' has also been employed in this context to characterise this interaction between the national and supra-national levels of law making. In his thorough study of the Spanish and French cases, Krisch shows that we cannot identify one overarching rule that would typify the relationship of national orders to the ECHR: 'while the domestic and European human rights law have indeed become increasingly linked and Strasbourg decisions are regularly followed by national courts, this does not indicate the emergence of a unified, hierarchically ordered system along constitutionalist lines'.⁶³ The ECtHR does not formally require that its provisions are invocable in domestic legal orders. State parties remain free to determine the effect, validity and rank of ECHR rights and those of ECtHR's judgments. This inevitably gives rise to a diversity of modes of incorporation in national legal orders. Krisch therefore emphasises the *heterarchical* rather than *hierarchial* order in that 'the relationship between the two levels is then determined not by one overarching rule, but by an oversupply of competing rules, among which solutions can only be found through political negotiations, often in the form of judicial politics'.⁶⁴

Krisch's analysis is very informative. However, one can argue that it is simply inadequate to reflect on human rights law with a constitutionalist (and normative) model to start with.⁶⁵ The analogy between human rights law and constitutional law is a complex question that requires assessment of a spectrum of criteria.⁶⁶ As Besson remarked in her review of Krisch's book, 'constitutionalism can mean anything from a theoretical and philosophical political model to a normative theory or to an ideology pertaining to the constitution in its various meanings'.⁶⁷ Among those basic and contentious criteria is the question whether the law of the ECHR gives rise to novel political community sustaining that constitutional model (in the name of which the

⁶¹ For a discussion on this point, see in particular Samantha Besson, 'The Erga Omnes Effect of the European Court of Human Rights', in Samantha Besson (ed), *La Cour Européenne des Droits de l'homme après le Protocole 14: Premier Bilan et Perspectives* [*The European Court of Human Rights after Protocol 14: Preliminary Assessment and Perspectives*] (Schulthess 2011) 125-175.

⁶² In support of this point, see in particular Samantha Besson, 'European Human Rights, Supranational Judicial Review and Democracy - Thinking Outside the Judicial Box,' in Patricia Popelier, Catherine Van de Heyning, and Piet Van Nuffel (eds), *Human Rights Protection in the European Legal Orders: Interaction Between European Courts and National Courts* (Cambridge University Press 2011) 97-146.

⁶³ Krisch (n 37) 151.

⁶⁴ *ibid* 127.

⁶⁵ See in particular the review by Samantha Besson, 'The Truth about Legal Pluralism' (2012) 8(2) *European Constitutional Law Review* (EuConst) 354.

⁶⁶ See in particular Stephen Gardbaum, 'Human Rights as International Constitutional Rights' (2008) 19(4) *European Journal of International Law* 749.

⁶⁷ (n 65) 358.

ECtHR would assert its authority, as the CJEU for the EU legal order), but the pluralism observed in current practice (generated by subsidiarity) is just too strong to even wonder whether the ECHR can resemble the supranational sovereign as hypothesised in his analysis of EU law. This leads us to a rather harsh conclusion: the terms by which legal pluralism has been framed in EU law, as those of sociological pluralism above, are inapplicable to European human rights law. It seems that the ECtHR does not exercise its authority in the name of novel and sovereign political community that would be *contested* by the national level.

5. Moral and Legal Pluralism: A Rejoinder

How shall we then understand the point (if any) of legal pluralism in the context of European human rights law? I suggest that one first turns to the role of pluralism *within* the concept human rights (law), that is, how pluralism justifies the duties correlative to those rights. This implies re-ordering the *legal-empirical* and the *normative levels* of argument: one has to address moral pluralism (internally) in order to capture the articulation of human rights law *qua* 'system' or 'order' (externally). We have seen above how this precedence is supported in normative human rights theory. I want now to show how normative theory coheres with legal practice. While legal human rights scholars tend to neglect the articulation between legal and moral pluralism, human rights theorists in normative theory often fail to give an account of how the national and supranational levels of human rights law-making ought to interact.⁶⁸

To this end, I suggest examining the role that the Strasbourg's court has assigned to pluralism in order to justify the rather extensive scope of the right to freedom of expression (Article 10). More precisely, I want to examine the interrelation between pluralism, expression and democracy in the reasoning of the ECtHR. The ECtHR long ago established the inherent link between expression and democracy. In the seminal *Handyside v United Kingdom*, which pertained to the publication of the Little Red School Book (encouraging young people to reflect on societal norms including sex and drugs), the ECtHR held that 'freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man (...)'.⁶⁹ Yet the ECtHR has not subsequently specified how expressing a view in public furthers individual self-development. Rather, it has placed emphasis on how the expression of pluralistic views benefits a democratic society as a whole. Since *Handyside v United Kingdom*, the ECtHR routinely relies on the Preamble's widely cited

⁶⁸ In the recent normative literature, Buchanan is perhaps the most closely interested in the legal practices of human rights. However, Buchanan does not specifically address (empirically or normatively) how the articulation between the two levels of human rights-law making ought to be understood. Buchanan simply suggests 'why it is important to have an international legal human rights system, rather than relying solely on regional systems' (157) and does not address the European context in details. Cf Buchanan (n 52).

⁶⁹ ECtHR, *Handyside v United Kingdom* (1976) 1 EHRR 737, para 49.

passage that ‘such are the demands of that pluralism, tolerance and broadmindedness without which there is no “democratic society”’⁷⁰ to support this emphasis.

It must be clear that the ECtHR’s emphasis on pluralism goes well beyond a mere factual recognition of diversity and disagreement in public debate. It plays a central *normative* role in justifying the wide scope assigned to expression. This can be seen in how pluralism generates a salient positive duty requiring states to guarantee access ‘not only to “information” or “ideas” that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb’ find a place in the public arena.⁷¹ This last statement has acquired the status of a *lingua franca* in the case law on freedom of expression and is routinely located at the ECtHR’s reasoning when it justifies, for instance, extremist political views; insults to heads of states, satire or just exaggeration in public debate. The thought is that the ECtHR does not just allow individuals to make their claim in the public arena, however ‘unpalatable’ they are. Rather, it suggests that the counterbalancing of views is the standard that should govern the scope of freedom of expression. Let us take the case of extremist political views. In *Gündüz v Turkey*, which concerned the leader of an Islamic sect defending sharia law on an independent Turkish television channel, the ECtHR famously held that while Sharia law is incompatible with a democratic society (it ‘clearly diverged from Convention values’⁷²), publicly defending its implementation cannot be subject to restriction under the ‘democratic necessity’ clause. The standard of measure, which in turn determines the margin of appreciation, is precisely whether the views expressed by the claimant were counterbalanced in the public arena:

the applicant's extremist views were already known and had been discussed in the public arena and, in particular, were counterbalanced by the intervention of the other participants in the programme; and lastly, they were expressed in the course of a pluralistic debate in which the applicant was actively taking part. Accordingly, the ECtHR considers that in the instant case the need for the restriction in issue has not been established convincingly.⁷³

In other words, the ECtHR suggests that extremist views are equally entitled to be expressed within an ongoing public debate (if those exist and seek to participate, which is demonstrated by the fact that they brought their case before the ECtHR) and counterbalanced with opposing views. The same is true, for instance, in *Lehideux and Isorni v France*, which pertained to the publication of a press article depicting the career of Marshal Pétain in a positive fashion condemned by the French courts. However, the ECtHR found a violation of Article 10 arguing that ‘that forms part of the efforts that

⁷⁰ *ibid.*

⁷¹ *ibid.*

⁷² ECtHR, *Gündüz v Turkey* (2003) 41 EHRR 5, para 51.

⁷³ *ibid.*

every country must make to debate its own history openly and dispassionately'.⁷⁴ Several questions emerge from this reading of the ECtHR's reasoning: is pluralism compelling because it allows individuals to find some form of *consensus* on issues on which they initially disagreed? Or is pluralism desirable because it allows publicly held views to go through the Millian process of 'trial and error' in the search for improved beliefs?

More importantly at this point: does the ECtHR's attachment to pluralism apply to all views held in public? The ECtHR faced this question, for instance, when it balanced freedom of expression against the right to reputation under Article 8 (privacy). In the recent *Von Hannover v Germany*, which concerned the publication of pictures of the private life of Princess Caroline of Monaco, the ECtHR made explicit that pluralism is particularly important when a *public* interest is at stake. The ECtHR circumscribes the domain of 'public interest' very clearly:

The ECtHR considers that a fundamental distinction needs to be made between reporting facts — even controversial ones — capable of contributing to a debate in a democratic society relating to politicians in the exercise of their functions, for example, and reporting details of the private life of an individual who, moreover, as in this case, does not exercise official functions. While in the former case the press exercises its vital role of 'watchdog' in a democracy by contributing to 'impart[ing] information and ideas on matters of public interest (...), it does not do so in the latter case'.⁷⁵

The suggestion here is that the margin of appreciation is contingent upon the degree to which the public expression of views contributes to an ongoing, plural and adversarial debate of public interest. In applying the 'democratic necessity' clause, the ECtHR systematically conducts such an assessment. In the recent case of *Otegi Mondragon v Spain*, in which the applicant heavily criticised the institution of the Spanish monarchy, the ECtHR confirmed that 'there is little scope under Article 10 § 2 for restrictions on freedom of expression in the area of political speech or debate — where freedom of expression is of the utmost importance — or in matters of public interest'.⁷⁶ More recently, in *Pentikäinen v Finland*, which pertained to the arrest of a photographer in demonstrations surrounding an Asia-Europe meeting in Helsinki, the ECtHR judged the facts against the same standard: 'the ECtHR considers that the demonstration was a matter of legitimate public interest, having regard in particular to its nature. From the point of view of the general public's right to receive information about matters of public interest, and thus from the standpoint of the press, there were justified grounds for reporting the event to the public'.⁷⁷

⁷⁴ ECtHR, *Lehideux and Isorni v France* (1998) 30 EHRR 665, para 51.

⁷⁵ ECtHR, *Von Hannover v Germany* (2004) 55 EHRR 15, para 63.

⁷⁶ ECtHR, *Otegi Mondragon v Spain*, App no 2034/07 8 (15 March 2011), para 50.

⁷⁷ ECtHR, *Pentikäinen v Finland* App no 11882/10 (4 February 2014), para 51.

The ECtHR's positive duty of pluralism culminates in the formal recognition that the larger public has a 'right to be informed' on issues of public interest. The right to be informed is clearly not confined to just hearing about a recent public issue. Here again, the ECtHR suggests that 'democratic society' requires people to receive plural perspectives on those issues. This right is first found in *Erdoğdu and İnce v Turkey*, which pertained to the interview of a sociologist on the conflict in Kurdistan; the ECtHR held that 'domestic authorities in the instant case failed to have sufficient regard to the public's right to be informed of a different perspective on the situation in south-east Turkey, irrespective of how unpalatable that perspective may be for them'.⁷⁸ A recent instance of this reasoning is found in *Çamyar and Berktaş v Turkey*, where the ECtHR examined the content of a book that severely criticises the Turkish penitentiary system.⁷⁹

6. Democracy and Pluralism in Democratic Theory

My overview of the ECtHR's reasoning suggests that moral pluralism plays a central justificatory role in grounding and limiting human rights. The 'right to be informed of a different perspective' is perhaps the clearest example. Interestingly, 'democratic society' prevails as grounding concept. The ECtHR takes pluralism as a requirement of democracy when national courts fail by that very standard. Yet despite this effort in conceptual exploration, the ECtHR does not explain why democracy thrives on pluralism. It does not thoroughly justify this broad range of (positive) duties or why those duties outweigh other rights in case of conflict. On pain of taking 'democratic society' as a determinate concept, one has to explain, in normative terms, why pluralism is inherent to the concept of democracy.

The final step of my argument precisely bridges the ECtHR's appeal to moral pluralism as inherent and beneficial to a 'democratic society', on the one hand, to the normative theories of human rights presented earlier, on the other. As we have seen, a thin but substantive notion of equal moral status transcends those theories (Griffin, Forst, Buchanan). Now, one can deploy this egalitarian basis to the circumscribed context of democratic debate. The protection of equal participation to the deliberative procedure leading to the adoption of collective binding norms recognises and affirms the equal status of individuals. The role that pluralism plays in this particular context needs to be adjusted, however. The pluralism flowing from the recognition and protection of human rights inevitably shapes the public debate that is at the core of the democratic process. Democratic theorists not only assume that there are deep conflicts about how to define the terms of association in a political community, they also point to the danger that, as a result, all views and interests are not equally represented and consequently that the outcome of the procedure is unfair.

⁷⁸ ECtHR, *Erdoğdu and İnce v Turkey* App No 25067/94 (8 July 1999), para 51.

⁷⁹ ECtHR, *Çamyar and Berktaş v Turkey* App no 41959/02 (15 February 2011), paras 37-38.

In his ground-breaking book, Thomas Christiano insists that the facts of *diversity*, *disagreement*, *cognitive bias* and *fallibility* pervade collective deliberations.⁸⁰ Those facts constitute a serious challenge to the realisation of 'public' equality. The effect of cognitive bias, for instance, is that a person's 'ideas about the good life and even justice tend to reflect her own background, distinctive experiences, and talents'.⁸¹ The risk is that this person's judgment about the common good (the right ideas and the right actions) unilaterally applied to all may fail to take into account the interests of others. Further, egalitarian democrats assume that such conflicts cannot be solved by rational persuasion on terms that will be acceptable to all, which marks the distinction with a range of views in deliberative democracy that very much place the threshold on the reaching of a consensus or an overlapping consensus. The cost of attempting to find consensus remains too high for egalitarian views based on the equal advancement of individual interests.⁸²

Now, a particular force of the egalitarian argument defended by Christiano is that it specifies which rights and duties promote the equal status of individuals in the circumstances of deep pluralism. It is not enough to plead for the equality-enhancing role of pluralism. One also has to translate this role into concrete practices of rights. As Christiano explains, 'the principle invites us to think about how all the rights, duties, roles, and special relationships fit together in an overall institutional scheme so that people's interests are advanced in such a way that they are advanced equally'.⁸³ More precisely, pluralism here requires that individual judgments on issues of public interest *should* be informed by those of others. If an individual advances a view regardless of what other individuals think, then she does not treat others as equals within the context of deep pluralism. Therefore, to be informed on others' views on an issue of public interest is instrumentally related to the quest for public equality ('instrumentally just'⁸⁴ in Christiano's terms).

This is precisely where the right to freedom of expression gains prominence. Allowing individuals to widely express their views in public equally ensures that their interests are equally taken into consideration (on issues of public interest, of course). Given the fact of deep pluralism, 'a person can learn just as much by having his ideas expressed by

⁸⁰ (no 10) 154.

⁸¹ *ibid.* As Christiano puts it in his reply to critics, 'I argue that under the right conditions a system of judicial review of legislation that empowers the judiciary to strike down legislation that violates public equality can be legitimate. This is because a decision of the democratic assembly that violates public equality has no value, so a court that strikes it down will at least have the value that it preserves public equality', in Thomas Christiano, 'Reply to Critics of the Constitution of Equality' (2011) 5(3) *The Journal of Ethics and Social Philosophy* 1, 3, available at <<http://www.jesp.org/symposia.php>> accessed 1 October 2014.

⁸² As Cohen explains, 'the deliberative conception requires more than the interests of others be given equal consideration; it demands, too, that we find politically acceptable reasons — reasons that are acceptable to others, given a background of differences of conscientious conviction', in Joshua Cohen, 'Procedure and Substance in Deliberative Democracy' in Thomas Christiano (ed), *Philosophy and Democracy: An Anthology* (Oxford University Press 2003) 24.

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⁸⁴ *ibid* 264.

others and responded to as he can by expressing his ideas himself'.⁸⁵ If those interests cannot be expressed in public equally, it involves 'a disastrous loss of standing among one's fellows'.⁸⁶ If the society is regulated by norms one cannot endorse, and if one's right to expression is not respected equally, then it 'gives one good reason to think that the dominant interests are being advanced and that one's own interests are not being advanced'.⁸⁷ It is therefore crucial to the egalitarian argument for democracy that individuals be equally entitled to *publicly* participate in the process of deliberation in order for them to see that they are treated as equals: 'the thought is that when an outcome is democratically chosen and some people disagree with the outcome, as some inevitably will, they still have a duty to go along with the decision because otherwise they would be treating the others unfairly'.⁸⁸ As a result, when the ECtHR justifies its interpretive authority by relying on pluralism, one can infer that it contributes the democratic legitimacy of a domestic piece of legislation. The authority is exercised not in the name of a novel political community but in the name of the democratic community of the state party in question — and the democratic *ethos* that comes with it.

Once one has a better understanding of the derivative role of legal pluralism from moral pluralism, one can better explain other systemic features of human rights law and in particular the multi-faceted principle of subsidiarity. The pluralism defended by the ECtHR is *procedural* rather than *substantive*. The ECtHR does not dictate the content but secures the conditions for the expression of an immanent pluralism in a given democratic society. This is why, I suggest, states are conceived as the primary duty-bearers of those rights (*jurisdictional* subsidiarity) and why the judgments of human rights courts are only declaratory (*remedial* subsidiarity). It allows states to interpret and implement human rights according to their particular pluralism. Despite the fact that states ratifying human rights treaties expresses a commitment to respecting pluralism domestically, the implementation of those rights by national courts inevitably touches upon the core of the public life of each state understood as a sovereign and democratic polity. This echoes the recent literature on the democratic legitimacy of human rights institutions, which rightly points out that national courts may develop and implement their interpretation of human rights through constitutional and democratic procedures.⁸⁹ There is no *a priori* antagonistic relationship between the democratic standards of law making and the requirements of human rights law.

Let me finally point to a potential objection to the overall view. Does the central and overlapping place that pluralism occupies in conceptualising human rights and

⁸⁵ *ibid* 131.

⁸⁶ *ibid* 153.

⁸⁷ Thomas Christiano, 'A Democratic Theory of Territory and Some Puzzles about Global Democracy' (2006) 37 *Journal of Social Philosophy* 1, 84.

⁸⁸ Thomas Christiano, 'Authority,' entry in *The Stanford Encyclopedia of Philosophy* (Spring 2013 edn): <<http://plato.stanford.edu/archives/spr2013/entries/authority/>> accessed 1 October 2014.

⁸⁹ In the recent literature, see in particular Steven Wheatley, 'On the Legitimate Authority of International Human Rights Bodies,' in Andreas Follesdal, Johan Karlsson. Schaffer and Geir Ulfstein (eds), *The Legitimacy of International Human Rights Regimes* (Cambridge University Press 2013).

democracy make it impossible to formulate ‘one right answer’ to human rights questions? One could argue that courts (national or supranational) should be the final arbiters of moral disputes. This view seems to suggest that law’s authority cannot both foster pluralism and stabilise normative expectations. I want to outline two different answers to this line of thought. First, in explaining how pluralism fits into the concept of human rights, I assume that law’s authority should not be independent from its content. This is why I insist on reconstructing the case law of the ECtHR and the justificatory role that pluralism plays in it. The concept of legitimacy here is *content-dependent* in the limited sense that the ECtHR’s reasoning is responsive to the egalitarian argument for democracy. This responsiveness hence stabilises normative expectations in that it gives (democratic) moral reasons to comply with the law. Second, it is important to reiterate that the pluralism invoked here does not apply all the way down. At the foundational level, human rights affirm and protect the inherent equal status of human beings (necessary to meet the demand of universality). The pluralistic element applies to the deployment and development of this abstract status in tangible contexts and practices — one of which is the democratic procedure. Therefore, the pluralism at stake here is by the same token an affirmation of this thin but substantive egalitarian basis. To hold that human rights are better understood in pluralist terms should be viewed from a liberal and therefore neutral standpoint — one that recognises, protects and promotes the equal status of all human beings without privileging a comprehensive notion of the good. In the democratic context, this implies both protecting the egalitarian procedure and setting limits to its outcome.

7. Conclusion

The core intuition behind this article was that the classical concept of legal pluralism cannot illuminate the practice of human rights law. Sociological pluralism is premised on the existence, and therefore the ontology, of two distinct normative ‘systems’ and ‘orders’. European legal pluralism is also premised on two ‘orders’ or ‘systems’ albeit of a normative kind. The first step was to characterise the commonality between two apparently different variants of legal pluralism. I suggested that what is assumed in those two concepts is the existence of large-scale boundaries (‘system’, ‘order’, ‘layer’, etc) closing the entity to the outside. Demonstrating the existence of those boundaries is particularly difficult for socio-legal scholars and this difficulty is simply replicated in the human rights context.

The second step of the argument was to show that the practice of European human rights law cannot be subsumed under this overlapping concept of legal pluralism. First, it is difficult to circumscribe human rights to one or the other normative orders that sociological pluralism implies. This is because pluralism forms part of the conceptual structure of human rights. Therefore, the pluralism of ‘orders’ or ‘systems’ is difficult to hold. Second, European human rights law does not involve a claim to legal completeness that would hold in the name of a novel political community as discussed in EU law. Consequently, legal pluralism in European human rights law cannot be depicted in large-

scale, systemic terms. The multifaceted principle of subsidiarity suggests that there is no necessary connection between the national and supranational levels of human rights-law making.

The third step was to take more seriously the ECtHR's internal standpoint and reconstruct the justificatory role assigned to moral pluralism. I showed that the ECtHR's interpretive authority is connected to the moral pluralism that *should* govern democratic process within state parties. I suggested this pluralism is needed to protect the thin but substantive equal moral status that underlies the foundations of both democracy and human rights. Further, this proposition suggests that the inherent link between pluralism, democracy and human rights *internally* construed explains the allocation of judicial authority between the national and the supranational levels. The emerging picture is that one needs to articulate the crucial role of moral pluralism within the concepts of human rights and democracy before addressing the boundaries between 'systems' or 'orders' in human rights law. The precedence of moral pluralism over legal pluralism is therefore obtained.